ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Implementation of Section 302 of the Telecommunications Act of 1996	)	CS Docket No. 96-46
	)	
Open Video Systems	)	

U S WEST, INC. REPLY COMMENTS

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SUMMARY

Once again, parties clash over how to implement a model for entry into the market for the delivery of video programming to consumers. Many of the comments on open video systems ("OVS") rehashed arguments made in the video dialtone proceeding. No useful purpose would be served in re-fighting old battles. U S WEST, Inc. urges the Federal Communications Commission ("Commission") to resist efforts to resurrect issues and approaches that would keep the Commission from following Congress' plan to reduce regulatory burdens and streamline regulatory processes.

The inability of some parties to let go of the past was dramatized by the number of proposals that went far beyond the scope of the NPRM. The Commission did not even request comment on the need for a separate subsidiary, nor on the power of local governments to regulate OVS, and yet some parties made these subjects the centerpiece of their comments. Others suggested an absurdly broad definition of the term "affiliate." Of course, many potential competitors of OVS operators argued for oppressive regulation of the non-discrimination requirements and for Commission-imposed procedures on joint marketing that would require the OVS operator to market the incumbent cable company's services to the exclusion of its own. Comments such as these detract from the main purpose of this proceeding: to implement OVS in a way that will make it an attractive and viable option for competitive entry.

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U S WEST, Inc. ("U S WEST") hereby submits its reply comments in connection with the Federal Communications Commission's ("Commission") Notice of Proposed Rulemaking ("NPRM") regarding the implementation of open video systems (or "OVS").[1]

I. INTRODUCTION

The NPRM attracted interest from every corner of the industry, and from numerous state and local government officials.[2] To a large extent, the positions

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[1] In the Matter of Implementation of Section 302 of the Telecommunications Act of 1996, Open Video Systems, CS Docket No. 96-46, In the Matter of Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58, CC Docket No. 87-266 (Terminated), Report and Order and Notice of Proposed Rulemaking, FCC 96-99, rel. Mar. 11, 1996.

[2] Commenters referenced herein include: Comcast Cable Communications, Inc., Adelphia Communications Corporation and InterMedia Partners, L.P. ("Comcast"); Alliance for Community Media, Alliance for Communications Democracy, Consumer Federation of America, Consumer Project on Technology, Center for Media Education, and People for the American Way ("Alliance"); Cities of Dallas, Texas; Denton, Texas; Houston, Texas; Plano, Texas; Fort Worth, Texas; Arlington, Texas; Irving, Texas; Longview, Texas and Brownfield, Texas ("Texas Cities"); City and County of Denver, Colorado ("City of Denver"); Cox Communications, Inc. ("Cox"); Home Box Office ("HBO"); Bell Atlantic Telephone Companies and Bell Atlantic Video Services Company, BellSouth

taken in response to the NPRM were fairly predictable. Cable companies asked the Commission to impose a separate subsidiary requirement, and argued for onerous rules regarding rates and other conditions of carriage.[3] Video programming providers (or "VPP") urged the Commission to require an OVS operator to provide incidental services to non-affiliated programmers on a non-discriminatory basis,[4] and one even asked the Commission to redefine the term "affiliate."[5] State and local governmental agencies and coalitions argued for an oversight role in the certification process to enforce compliance with public, educational and governmental ("PEG") requirements,[6] and some insisted (curiously, in the context of a federal rulemaking proceeding) that previously-granted rights-of-way could not be used for OVS.[7] Other local exchange carriers ("LEC") and USTA argued for maximum flexibility, and stressed the importance of minimal regulation if OVS is

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Corporation and BellSouth Telecommunications, Inc., GTE Service Corporation and its affiliated domestic telephone operating companies and GTE Media Ventures, Inc., Lincoln Telephone and Telegraph Company, Pacific Bell, SBC Communications, Inc. and Southwestern Bell Telephone Company ("Joint LEC Commenters"); MCI Telecommunications Corporation ("MCI"); MFS Communications Company, Inc. ("MFS"); National Cable Television Association, Inc. ("NCTA"); National League of Cities, et al., ("National League of Cities"); New York State Department of Public Service ("NYDPS"); NYNEX Corporation ("NYNEX"); People of the State of California and the Public Utilities Commission of the State of California ("CaPUC"); Rainbow Programming Holdings, Inc. ("Rainbow"); Tele-Communications, Inc. ("TCI"); United States Telephone Association ("USTA").

[3] See, e.g., Cox at 5-9; Comcast at 7-9; TCI at 15-17.

[4] See, e.g., Rainbow at 5, 17-19; HBO at 18.

[5] Rainbow at 7-8.

[6] See, e.g., NYDPS at 3-4; CaPUC at 12-13; Texas Cities at 8-9; City of Denver at 8-9.

[7] See, e.g., Texas Cities at 12-16.

to fulfill its purpose as an option for LEC entry into the market for delivery of video programming.[8]

Many other entities and groups filed comments, but little would be gained from rearguing positions that U S WEST took in its initial comments. Rather, in the interest of efficiency, U S WEST generally will limit its reply comments to new issues and matters of particular importance.

II. EXCESSIVE REGULATION WILL DESTROY OVS AS A VEHICLE FOR COMPETITIVE ENTRY

The Commission is facing innumerable demands from all sides, and has many proposals to evaluate in a compressed timeframe. The Commission's first priority must be the development of effective intersystem competition because without that, none of the other goals emphasized by various commenters (e.g. promote intrasystem competition, increase access to non-profit programming and locally-oriented programming) is attainable.

While many commenters would have the Commission believe otherwise, the primary purpose of OVS is to introduce competition into the market for delivery of video programming so that consumers will benefit. The Conference Report repeatedly stresses the importance of creating "multiple entry options" as a way to "encourage entry" and to "promote competition, to encourage investment in new technologies and to maximize consumer choice of services that best meet their

[8] See, e.g., Joint LEC Commenters at iv, 6-7; NYNEX at ii-iv, 4-5; USTA at 3-5.

information and entertainment needs."[9] As a result, the Commission should minimize the amount of regulation, and refrain from adopting pervasive rules that will undermine OVS as a viable entry option.[10]

As if anticipating the onslaught of comments urging the Commission to smother OVS with rules and regulations, Congress gave three reasons for streamlining the regulatory obligations of OVS:

> First, the conferees hope that this approach will encourage common carriers to deploy open video systems and introduce vigorous competition in entertainment and information markets. Second, the conferees recognize that common carriers that deploy open systems will be "new" entrants in established markets and deserve lighter regulatory burdens to level the playing field. Third, the development of competition and the operation of market forces mean that government oversight and regulation can and should be reduced.[11]

Against this backdrop, the Commission should not be swayed by the now-familiar arguments advanced in support of pervasive regulation.[12]

The Commission has a rare second chance to foster competitive entry into the market for delivery of video services to consumers. The safest course is to follow the path laid out by Congress: streamlined regulation, reduced regulatory burdens,

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[9] S.652, 104th Cong., 2d Sess., Conference Report at 177, 172 (Jan. 31, 1996) ("Conference Report").

[10] Other options -- such as Multichannel Multipoint Distribution Service -- are not subject to extensive regulatory requirements. The Commission should strive to make the various options equally attractive to new entrants and to existing players, including cable companies.

[11] Conference Report at 178.

[12] See, e.g., the positions taken and arguments made by cable companies and their associations in the video dialtone proceeding. Comments of NCTA, CC Docket No. 87-266, filed Mar. 21, 1995 at 16-26, 33-55; Reply Comments of the Joint Parties Adelphia Communications Corporation, et al., CC Docket No. 87-266, filed Apr. 11, 1995 at 12-29; Petition for Reconsideration of Cox Enterprises, Inc., et al., CC Docket No. 87-266, filed Jan. 12, 1995 at 9-17.

reliance on market forces. The rules proposed by the Joint LEC Commenters in the Appendix to their joint filing are an excellent starting point. Should the Commission choose another path, OVS will never fulfill its promise of providing a vehicle for competitive entry, and the Commission probably will never get another chance.

III. MANY PROPOSALS SHOULD BE COMPLETELY DISREGARDED AS IRRELEVANT OR EXTREME

Many parties went far beyond the proposals and areas outlined for comment in the NPRM, reviving old theories and approaches that have not worked, and inventing new ones that hold no more promise of success. Comments that simply re-hashed old positions on matters beyond the scope of the NPRM should be rejected in the first instance as irrelevant. The Commission has enough to do -- only those comments that addressed the specific issues raised in the NPRM should be considered by the Commission.

A. No Separate Subsidiary Is Required For OVS

The Commission did not even suggest the need for a separate subsidiary in the NPRM. Many parties, however, argued that such a requirement is "absolutely essential"[13] and "necessary" to implement the non-discrimination provisions.[14]

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[13] See, e.g., NCTA at 27; TCI at 15-17; Rainbow at 25-27.

TCI and Rainbow are just plain wrong in their interpretation of the separate affiliate section of the 1996 Act.[15] A Bell Operating Company ("BOC") is not required to provide video programming services through a separate affiliate. Incidental interLATA services are exempted from the separate affiliate requirement, and are expressly defined to include provision of video programming services to subscribers.[16] TCI and Rainbow make no sense when they claim that "the actual provision of service to the public is not an incidental service[.]"[17] The point is that the interLATA transmissions are incidental to the provision of video programming service -- that is why no separate subsidiary is required under the 1996 Act.

Similarly, NCTA is off-base when it argues that "[s]atellite delivered video programming is an interLATA service . . . there is nothing 'incidental' about [the transmission]."[18] Provision of video programming service to subscribers involves many functions, including marketing, billing and collection, provision of customer premises equipment ("CPE"), etc. The actual transport of the signal -- whether by

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[14] Alliance at 7. Alliance argues for a separate subsidiary requirement, but cites neither the Telecommunications Act of 1996 , Pub. L. No. 104-104, 110 Stat. 56 (1996) ("1996 Act") nor the Conference Report.

[15] TCI at 16-17; Rainbow at 26-27.

[16] 1996 Act, 110 Stat. at 92 § 272(a)(2)(B)(i), *read in conjunction with* 110 Stat. at 91 § 271(g)(1)(A), (B) & (C).

[17] TCI at 16, n.48; Rainbow at 26-27, n.70.

[18] NCTA at 27, n.28.

satellite or other means -- is just one part of the overall provisioning of the service, and is incidental in every sense of the word.

Others argue that the Commission should impose a separate subsidiary requirement under its general authority "to prescribe safeguards consistent with the public interest, convenience, and necessity."[19] Such a requirement is unnecessary. Non-structural safeguards will adequately protect LEC ratepayers from the risk of cross-subsidization and self-dealing.

B. Cost-Based Rates And Tariff Requirements Would Violate Congress' Prohibition Against Title II-Like Regulation

Several commenters urged the Commission to establish cost-based rates, and to require OVS operators to file tariffs.[20] MCI concedes that this approach is inconsistent with Congress' direction not to impose Title II-like regulation on OVS operators, but argues that the "plain language" of Section 653 overrides the language in the conference report.[21]

MCI completely overlooks the plain language of Section 651, which makes clear that when common carriers provide video programming to subscribers by means of a certified open video system, they are subject to the requirements of Part V of title VI (Video Programming Services Provided by Telephone Companies), and

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[19] 1996 Act, 110 Stat. at 94 § 272(f)(3). See, e.g., TCI at 15.

[20] See, e.g., MCI at 8-9; National League of Cities at 16-21.

[21] MCI at 8. "There are significant places in Section 653 which clearly require the Commission to impose title II-like regulation."

only those provisions of parts of I through IV of title VI as are specifically provided in new Section 653(c).[22] The Conference Report unequivocally states that "[o]pen video systems are not subject to the requirements of title II for the provision of video programming or cable services," and that "open video systems . . . will be subject to new section 653, not title II."[23] It goes on to say that "[n]ew section 653(c) is a further attempt to ensure that operators of open video systems are not burdened with unreasonable regulatory obligations."[24] Congress' intent regarding the non-applicability of title II could not be more clear.

U S WEST agrees with NYNEX and MFS that OVS is "a prime candidate for forbearance."[25] Forbearance from rate regulation is consistent with the public interest because it would promote competition among providers of cable services.[26] As the new entrant in a market dominated by the incumbent cable company, the OVS operator must be permitted to set its own rates in the first instance, subject to Commission review. Otherwise, the OVS operator would be deprived of the ability to respond to aggressive discounting or other actions that the incumbent might take to impede entry.

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[22] Conference Report at 172, explaining Section 651(a)(3)(B).

[23] Id. at 172, 178-79.

[24] Id. at 178.

[25] NYNEX at ii, 22-23; MFS at 10-13.

[26] See 1996 Act, 110 Stat. at 128 § 401 (47 USC § 10(b)).

C. An OVS Operator Has No Obligation To Provide Unregulated Services On A Non-Discriminatory Basis

Some parties argued that the Commission should require the OVS operator to provide billing, CPE, marketing and promotional services on a non-discriminatory basis to non-affiliated programmers.[27] For example, Rainbow claims that the Commission has authority to "require an OVS operator to make available all equipment necessary to access the OVS platform and provide service to customers on the same rates, terms and conditions provided to its affiliated programmers."[28] Similarly, HBO argued that "advertising must be done in the context of the OVS operator's non-discrimination obligations."[29]

As the Commission recognized in the video dialtone proceeding, advertising, billing and collection, and other services are unregulated and need not be provided on a non-discriminatory basis.[30] Furthermore, as NYNEX correctly points out, reading the non-discrimination requirement this broadly would impair the OVS operator's ability to compete with other program services, and would inhibit LEC investment in OVS infrastructure and technology.[31] LECs surely will not have

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[27] See, e.g., Rainbow at 5, 17-19; HBO at 18.

[28] Rainbow at 18.

[29] HBO at 19.

[30] In the Matter of Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54 - 63.58, Second Report and Order, Recommendation to Congress, and Second Further Notice of Proposed Rulemaking, 7 FCC Rcd. 5781, 5828-29 ¶ 92 (1992).

[31] NYNEX at 25.

much interest in OVS if they must provide unregulated services on a non-discriminatory basis and are restricted to a "carrier-user" relationship with programmers, as advocated by the National League of Cities.[32] Such restrictions truly would be a step backwards.

D. There Is No Reason To Define The Term "Affiliate" In This Proceeding

TCI and Rainbow argue for an expanded definition of the term "affiliate," to include "any financial or business relationships, by contract or otherwise, directly or indirectly, between the OVS operator and the VPP, except the carrier-user relationship."[33] The Commission should reject this extreme proposal because it would make practically every VPP providing video programming over an open video system an affiliate of the OVS operator. Besides, the Commission has requested comment on the definition of "affiliate" in the OVS context in a separate Notice, and need not decide the issue here.[34]

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[32] National League of Cities at 21-22.

[33] Rainbow at 7-8; TCI at 8.

[34] In the Matter of Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996, CS Docket No. 96-85, Order and Notice of Proposed Rulemaking, FCC 96-154, rel. Apr. 9, 1996.

E. The Commission Should Not Limit An OVS Operator's Ability To Engage In Joint Marketing

Cox argues that LECs should not be permitted to jointly market telephone and cable services "until a state certifies that the LEC is in compliance with all the obligations imposed under Sections 251 and 252 of the 1996 Act."[35] There is no statutory basis for imposing such a restriction, nor is one needed. Congress spelled out when a BOC may not market or sell certain services. Those restrictions apply only to BOCs (not to all LECs), and they relate only to the marketing or sale of telephone exchange services by a BOC long-distance affiliate and to the marketing or sale of interLATA services by a BOC.[36] Had Congress intended to limit an OVS operator's ability to jointly market telephone and cable services, it would have done so.

There is certainly no basis for requiring LECs to market their competitors' services to the exclusion of their own, as some parties suggested. For example, NCTA suggested that the Commission establish procedures for inbound telemarketing calls, requiring the incumbent LEC to provide only the name, address and telephone number of the local cable operator, and give no information about the LEC's own cable service.[37] This suggestion is absurd. Not only would it

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[35] Cox at 9.

[36] 1996 Act, 110 Stat. at 94 § 272(g).

[37] NCTA at 25.

allow the cable company to free-ride on the LEC's customer service efforts, it also would perpetuate consumers' perception that they have no choice for cable service.

If the Commission feels compelled to regulate joint marketing activities, the goal should be to ensure that there truly is a level playing field so that cable companies and their LEC competitors have equal opportunities to market services jointly. Fundamentally, however, U S WEST believes that competition is likely to develop more rapidly in telephony and cable if new entrants are permitted to market services in whatever manner they see fit. Otherwise, entry would be chilled.

F. Congress Intended That Local Government Authorities Have Very Limited Authority Over OVS Operations

U S WEST strongly opposes the National League of Cities' proposal that an OVS certification include "incontestable evidence of specific authorization from each affected local government to use its public rights-of-way for OVS purposes -- either in the form of attached licenses or franchises from each local community, or through written certifications . . . ."[38] Congress expressly relieved OVS operators of franchise requirements which give cities most of their authority under the Cable Act. In lieu of the franchise, cities are entitled to charge a fee that does not exceed the fee charged to the incumbent cable operator, and are entitled to administer PEG requirements. LECs do not need any additional authority to use existing right-of-

[38] National League of Cities at 70.

way grants, and the Commission should take whatever steps are necessary to prevent local governments from erecting barriers to entry by imposing content-based restrictions on the use of existing rights-of-way that bear no rational relationship to public safety and welfare.

IV. CONCLUSION

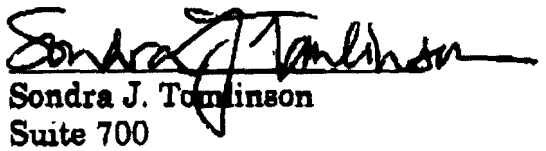
Many parties would like the Commission to behave like an overprotective parent, i.e., create a lot of frustrating requirements and restrictions, and attempt to prevent all potentially negative outcomes. Like the child in this scenario, OVS would never reach its full potential if treated this way. And, like the parent, the Commission would become wrapped-up in a never-ending quest to control things that are fundamentally beyond its control. Neither would be satisfied, and eventually the interaction would break down completely, as it did with video dialtone.

U S WEST implores the Commission to break the regulatory cycle that has inhibited development of this industry. OVS operators must have substantial freedom if they are to compete effectively. The open video systems model will not mature overnight, and the Commission will have many opportunities to correct its course, should correction become necessary. For now, the Commission should give OVS operators the opportunity to prove themselves in the face of enormous technological, financial and marketing challenges, and in the face of intense competition from experienced incumbents. Excessive regulation would discourage

prospective OVS operators from taking the risks and making the investments necessary to succeed.

Respectfully submitted,

U S WEST, INC.

By 

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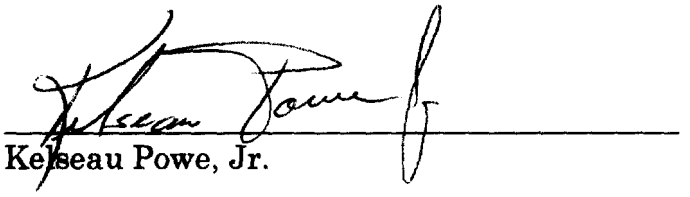
CERTIFICATE OF SERVICE

I, Kelseau Powe, Jr., do hereby certify that on this 11th day of April, 1996, I have caused a copy of the foregoing **U S WEST, INC. REPLY COMMENTS** to be served via first-class United States Mail, postage prepaid, upon the persons listed on the attached service list.



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